## APPENDIX A.

United States Court of Appeals
For the Eighth Circuit.

No. 19,149.

Gaggett Transportation Company, Appellant,

vs.

Hughes Transportation, Inc., and Interstate Commerce Commission, Appellees.

Appeal from the United States District Court for the Western District of Missouri.

[April 30, 1968.]

Before Vogel, Senior Circuit Judge; Blackmun and Lay, Circuit Judges.

Vogel, Senior Circuit Judge.

Baggett Transportation Company, defendant-appellant, hereinafter referred to as Baggett, appeals from an order entered January 8, 1968, by the United States District Court for the Western District of Missouri, Southwestern Division, which order granted a temporary injunction against Baggett in a suit brought by Hughes Transportation, Inc., plaintiff-appellee, a competing motor common carrier, such action being instituted pursuant to 49 U. S. C. A., § 322 (b) (2); Pub. L. 89-170, 79 Stat. 649 (1965). We have jurisdiction of this appeal under 28 U. S. C. A., § 1292 (a) (1). A chronology of the events leading up to the granting of the temporary injunction is essential.

On May 10, 1966, Tri-State Motor Transit Company, hereinafter Tri-State (Hughes is a wholly owned subsidiary of Tri-State), commenced a civil injunction action against Baggett pursuant to the provisions of 49 U. S. C. A., § 322 (b) (2). Such case was docketed as civil action No. 2000 in the Western District of Missouri, Southwestern Division.[1] On June 16, 1966, the Interstate Commerce Commission instituted an investigation proceeding in No. MC-C-5213 entitled "Baggett Transportation Company—Investigation and Revocation of Certificates". The ICC then filed in civil action No. 2000 a notice pursuant to 49 U. S. C. A., § 322 (b) (3) advising the District Court that it was considering the issues involved in such suit. Thereupon the District Court entered an order staying that action. On September 8, 1967, the ICC rendered its decision in No. MC-C-5213 construing Baggett's certificate of public convenience and necessity and finding that it was not authorized to render the type of service being performed by it and ordered it to cease and desist from such operations. The order of the ICC was to become effective on November 9, 1967.

On October 31, 1967, Baggett filed an action against the ICC and the United States of America in the District

---

[1] Prior to commencement of the Tri-State suit, civil action No. 2000, an informal opinion was obtained from the ICC as to the legality of Baggett's transportation operations by which it tacked and joined authorities in violation of the following restriction in its certificate:

> "* * * No single portion of the authority contained hereinabove shall be tacked or joined, directly or indirectly, with any other authority contained hereinabove for the purpose of performing any through service."

Such opinion letter, dated February 7, 1966, was introduced at the hearing on the instant case, *Hughes v. Baggett*, on December 27, 1967, as Exhibit No. P-X 1. This opinion clearly indicated that Baggett was operating under a combination of authorities which amounted to "* * * tacking or joining them directly for the purpose of performing a through service within the meaning of the restriction".

Court for the Northern District of Alabama, requesting the designation of a Three-Judge Court under the provisions of 28 U. S. C. A., § 2284, to review, set aside and enjoin the enforcement of the ICC's order. Baggett's motion for a temporary restraining order under 28 U. S. C. A. § 2284 (3) was heard by Chief Judge Seybourn H. Lynne at Birmingham, Alabama, on November 6, 1967.

Judge Lynne, being advised of the proceedings before Judge Hunter in the Western District of Missouri, withheld entering any order, preferring to await the outcome of civil action No. 2000 which was set for trial before Judge Hunter on November 8, 1967. At the conclusion of the hearing on November 8, 1967, Judge Hunter terminated the stay theretofore entered. He further held that he would not enter a temporary injunction in view of the fact that the ICC order requiring Baggett to cease and desist went into effect at midnight on that day. Judge Hunter's ruling in civil action No. 2000 was made at 4:00 o'clock P. M. on November 8, 1967. That evening at about 9:00 P. M. Baggett's attorneys obtained a restraining order from Judge Lynne at Birmingham, Alabama, enjoining the enforcement and effectiveness of the ICC's cease and desist order.

On December 15, 1967, Hughes, the wholly owned subsidiary of Tri-State, filed the instant action in the Western District of Missouri, the same being docketed as civil action No. 2079. It asked for an injunction against Baggett to restrain Baggett from performing operations in interstate commerce contrary to the provisions of Baggett's operating certificate of public convenience and necessity. At the same time Hughes asked for a temporary injunction. Baggett filed its answer and the ICC filed its motion for leave to intervene as party *plaintiff*. (On this appeal the ICC continues to support the position of Hughes, and has filed brief and had its counsel present oral argument.) A hearing on Hughes' motion for tempo-

rary injunction was heard on December 27, 1967, by Judge Hunter who, after taking the matter under advisement, did on January 8, 1968, render his memorandum opinion and order enjoining Baggett from tacking or joining, directly or indirectly, any two or more segments of its authority in No. MC-76177, Sup. 273; upon condition that Hughes file an approved bond in the amount of $100,000 to protect the interests of Baggett should the temporary injunction be later proven unwarranted by the facts and circumstances. Such bond was filed and approved on January 8, 1968, the same day as Judge Hunter's order was entered.

49 U. S. C. A., § 322 (b) (2) provides, insofar as it may be pertinent herein:

> "If any person operates in clear and patent violation of any provisions of section 303 (c), 306, 309, or 311 of this title, or any rule, regulation, requirement, or order thereunder, any person injured thereby may apply to the district court of the United States for any district where such person so violating operates, for the enforcement of such section, or of such rule, regulation, requirement, or order. The court shall have jurisdiction to enforce obedience thereto by a writ of injunction or by other process, mandatory or otherwise, restraining such person, his or its officers, agents, employees, and representatives from further violation of such section or of such rule, regulation, requirement, or order; and enjoining upon it or them obedience thereto. A copy of any application for relief filed pursuant to this paragraph shall be served upon the Commission and a certificate of such service shall appear in such application. The Commission may appear as of right in any such action. The party who or which prevails in any such action may, in the discretion of the court, recover reasonable attorney's fees to be fixed by the court, in addition to any costs

> allowable, under the Federal Rules of Civil Procedure, and the plaintiff instituting such action shall be required to give security, in such sum as the court deems proper to protect the interests of the party or parties against whom any temporary restraining order, temporary injunctive, or other process is issued should it later be proven unwarranted by the facts and circumstances."

The foregoing section was a 1965 amendment, the purpose of which was to "afford injured parties a measure of self-protection against operations which are openly and obviously unlawful". 1965 U. S. Code Cong. & Adm. News, Vol. 2, at 2931. Prior thereto only the Commission could go into District Court and obtain an enforcement order. Obviously, the Congress desired to expedite the remedy where "clear and patent" violations were established.

Baggett's certificate of public convenience and necessity contained the following restriction:

> "* * * No single portion of the authority contained hereinabove shall be tacked or joined, directly or indirectly, with any other authority contained hereinabove for the purpose of performing any through service."

Judge Hunter found that Baggett had been operating and would continue to operate in clear and patent violation of §§ 303 (c) and 306 of Title 49; that its tacking of its various authorities was in direct opposition to the restriction contained in its certificate and clearly exceeded the authority granted it.

The primary question on appeal relates to the right and propriety of the District Court for the Western District of Missouri to entertain and issue the injunction when there was pending at the same time the review action in the District Court for the Northern District of Alabama.

First, we make the general observation that the granting of a temporary injunction is addressed to the discretion of the trial court and not that of the appellate court. The merits of the case will not be considered excepting only as their consideration may be necessary to determine whether the trial court "* * * improvidently exercise[d] its judicial discretion." 7 Moore Federal Practice, § 65.04 [2] at 1630-31; *Benson Hotel Corp. v. Woods,* 8 Cir., 1948, 168 F. 2d 694.

It is the contention of Baggett, the appellant herein, that the complained-of injunction entered January 8, 1968, by Judge Hunter of the Western District of Missouri had the direct effect of nullifying the order of Judge Lynne of the Northern District of Alabama dated November 8, 1967, which enjoined the enforcement and effectiveness of the ICC's cease and desist order. Appellant's counsel are frank to state that "* * * research has revealed no federal and only one state-court case which has involved or discussed the precise point here—that is, the nullification by one district court through injunctive relief of an order restraining the enforcement of an administrative decision pending its review."

An analysis of the 1965 amendment and its purposes and objectives would seem to be called for. 49 U. S. C. A., § 322 (a) (b) as it existed prior to the 1965 amendment limited enforcement actions to the Commission itself or its duly authorized agent who could apply to the District Court of the United States for any District where such carrier or broker operates for enforcement. It seems obvious that the Congress, by the passage of § 322 (b) (2), effective September 6, 1965, sought to enlarge the number of persons who could seek enforcement in the District Court to include any person injured by clear and patent violations of any of the provisions of §§ 303 (c), 306, 307 or 311 of Title 49. As already referred to supra, this particular section is designed to "afford injured parties

a measure of self-protection against operations which are openly and obviously unlawful." 1965 U. S. Code Cong. & Adm. News, Vol. 2, at 2931. The statute as amended set forth the basic elements of the private right of action:

(1) Defendant must be operating in clear and patent violation of certain sections of the Interstate Commerce Act and plaintiff must be injured by such unlawful operations.

(2) Plaintiff may file suit in the federal district court of any district where the defendant operates and the prevailing party may, in the discretion of the court, recover reasonable attorney's fees as well as costs.

(3) The District Court can issue an injunction or restraining order enforcing obedience to the law, but plaintiff must post security to protect the interests of any party against whom a temporary restraining order or injunction is issued should it prove to be unwarranted.

(4) A copy of the complaint must be served upon the ICC, which can intervene as of right. The ICC may notify the court that it is considering the matter and the court shall stay further action pending disposition of the proceeding before the Commission.

Of the 1965 amendment, the Honorable Oren Harris, Chairman of the Committee on Interstate and Foreign Commerce (now Chief Judge of the Western District of Arkansas) stated:

> "* * * We firmly believe this new enforcement tool will be a good one. It should not be subverted by any practice which will avoid or delay prompt settlement of the issues." 111 Cong. Rec. 9679.

The Congressional concern evidenced by Congressman Harris' remarks is well placed. The goal of seeking more efficient action through the administrative process than can be obtained through the courts has not always been

realized. There is in the first instance the undue delay that may result from the administrative decision-making process itself. See 1 Davis, Administrative Law, § 8.08, pp. 548-50. Further delay in effectively enforcing the administrative decision can result from lengthy review proceedings of the administrative action in the courts. For example, the three-year delay in enforcing the administrative decision in the *Covington Mills* case eventually succeeded in rendering a valid administrative decision moot. *Mitchell* v. *Covington Mills*, D. C. Cir., 1955, 229 F. 2d 506, cert. denied, 1956, 350 U. S. 1002; see, Gellhorn & Byse, Administrative Law, pp. 232-35.

The instant case is a further example of the possible harm occasioned by unnecessary delay in effectuating an administrative decision because of judicial review of the administrative decision. The District Court has found that Baggett's operations deprive appellee Hughes of revenues ranging from $300,000 to $500,000 per year. The stay order permitting Baggett to continue its operations while the review proceedings continued was entered on November 8, 1967. The Three-Judge District Court designated to review the ICC order had not sat to hear the review at the time of the oral argument in this case. It is obvious that appellee Hughes will lose considerable revenue if the injunction below is dissolved and the ICC order is eventually upheld. Under the current status of the law, however, Hughes would have no remedy to recover its damages from Baggett. *McFaddin Express, Inc.* v. *Adley Corp.*, 2 Cir., 1966, 363 F. 2d 546, 549-50, cert. denied, 385 U. S. 900; *Riss & Company* v. *Association of American Railroads*, D. C. D. C., 1959, 178 F. Supp. 438.

The Congressional concern with eliminating delay which prevents innocent parties from securing prompt and effective protection was manifest in the 1965 amendment. Thus, in discussing the amendment increasing the civil penalties,

the House Report appropriately notes that: "Under existing law, procedures for dealing with certain motor carrier violations are often slow and cumbersome, and frequently ineffective." 1965 U. S. Code Cong. & Adm. News, Vol. 2, at 2929. Certainly one way of securing prompt and effective protection for innocent persons injured by the clearly illegal operations of other carriers is to give the injured persons the right to apply for injunctive relief independently of any Commission proceedings. § 322 (b) (2) accomplishes this by allowing injured persons to enjoin "clear and patent" violations.

Not only is a remedy provided therein, the words "clear and patent" are judiciously used to indicate jurisdiction separate and apart from the ICC's primary jurisdiction. Thus the House Report notes that, "* * * the words 'clear and patent' are used and are intended as a standard of jurisdiction rather than as a measure of the required burden of proof." 1965 U. S. Code Cong. & Adm. News, Vol. 2, at 2931. In order to regain primary jurisdiction of the controversy and also to prevent the use of § 322 (b) (2) to harass carriers legitimately operating, the ICC may take jurisdiction of the matter under § 322 (b) (3) and stay further action in the District Court. See 1965 U. S. Code Cong. & Adm. News, Vol. 2, at 2943. Thus it is clear that the court below did have jurisdiction and has not invaded the primary jurisdiction of the ICC because while the ICC has intervened, it has not sought to stay under § 322 (b) (3).

Appellant argues that such a stay was filed by the ICC in the original Tri-state suit and § 322 (b) (3) cannot be avoided by simply filing a new suit in which the ICC declines to file a stay. We do not believe that appellant's interpretation comports with a literal reading of the two sections. § 322 (b) (2) contains an affirmative grant of jurisdiction to the District Courts, whereas § 322 (b) (3)

is only permissive in allowing the ICC to seek a stay by filing a notice "In any action brought under paragraph (2) * * *." Obviously this is an action brought under paragraph (2) and the ICC has not filed for a stay. Neither are we able to agree with the premise underlying this argument to the effect that the issues in the suit filed by Hughes and that filed by Tri-State, which has now in effect become the Alabama review proceeding, are identical. Obviously the parties are different, the equities may be different, and the injury may differ in effect and extent. There are further substantial differences between the suit brought by Hughes herein in the Western District of Missouri and the suit brought by Baggett in the Northern District of Alabama. In the former, enforcement action may be brought by any plaintiff who is injured by the clear and patent violation of the Act; attorney's fees as well as costs may be collected; an injunction or restraining order enforcing obedience to the law may be granted immediately, and plaintiff must post security to protect the interests of the defendant in the event the restraining order or injunction be unwarranted. We think, then, Congress was interested in providing for an immediate relief with proper protection for anyone who might be injured thereby. No such provisions are found in the statute authorizing the review action commenced by Baggett in the Northern District of Alabama. Such benefits are substantial and place the instant action on an entirely different level from the action commenced by Baggett in the Northern District of Alabama.

While the difference in level stems from the statutory scheme encompassed in the 1965 amendment, the difference may be emphasized by the distinct issues involved in determining whether an injunction should issue by the court below and whether a stay order should issue from the reviewing court. § 10 (d) of the Administrative Procedure Act provides that a reviewing court may stay the

order of an administrative agency upon "such conditions as may be required and to the extent necessary to prevent irreparable injury." 5 U. S. C. A., § 1009 (d). See 28 U. S. C. A., § 2324. In *Virginia Petroleum Job. Ass'n v. Federal Power Commission,* D. C. Cir., 1958, 259 F. 2d 921, 925, the conditions which must be met before a stay may be granted of an administrative agency order were outlined. The four requirements were:

> "* * * (1) Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal? * * * (2) Has the petitioner shown that without such relief, it will be irreparably injured? * * * (3) Would the issuance of a stay substantially harm other parties interested in the proceedings? * * * (4) Where lies the public interest? * * *"

Accord, *Eastern Air Lines v. Civil Aeronautics Board,* 2 Cir., 1958, 261 F. 2d 830; *Associated Securities Corp. v. Securities & Exch. Commission,* 10 Cir., 1960, 283 F. 2d 773, 774-775; *Hamlin Testing Lab., Inc. v. United States Atomic Energy Commission,* 6 Cir., 1964, 337 F. 2d 221, 222; *Covington v. Schwartz,* D. C. Cal., 1964, 230 F. Supp. 249, modified on other grounds and aff'd, 9 Cir., 1965, 341 F. 2d 537. The test is apparently the same under 28 U. S. C. A., § 2324. See, *Whitehead Brothers Co. v. United States,* D. C. Mass., 1965, 247 F. Supp. 614. This test is obviously different from that involved in determining whether a District Court should issue an injunction pursuant to § 322. (b) (2) which requires only a clear and patent violation and injury thereby to the petitioner.

In this appeal, Baggett claims bitterly that as a matter of comity and of the orderly administration of justice the District Court for the Western District of Missouri should have refused to exercise its jurisdiction to interfere with the District Court action and decree in the Northern District of Alabama. We do not so find. The orders are

different and are based upon separate provisions of the statute. The granting of one does not necessarily prohibit the exercise of the other. In this regard, however, it could possibly be said that if the waters of comity between courts be muddied here, it was Baggett who did the muddying. Baggett was a defendant in civil action No. 2000 brought in May 1966 in the Western District in Missouri. It was aware of the ICC's informal opinion of February 7, 1966. It was aware of the ICC's decision of September 8, 1967, which arose out of the Tri-State suit against Baggett commenced in the Western District of Missouri. Judge Hunter's oral opinion and ruling in case No. 2000 in the Western District of Missouri actually preceded the restraining order issued by the District Court for the Northern District of Alabama. Judge Hunter indicated by his opinion that he expected the ICC's cease and desist order to become effective after 12:01 a.m. on November 9, 1967. Judge Hunter also made clear that his restraint depended in part, at least, on his belief that the Alabama court was not going to enter a restraining order preventing the ICC order from going into effect. Accordingly, he issued no cease and desist order of his own, but his intent was apparent and the effect of his oral ruling was the same as if he had done so. He was willing to allow the ICC's order to become effective instead of issuing one of his own. His intent was clear. If comity be involved at all, then we think no restraining order would have been issued by the Alabama court, had the latter been fully apprised of Judge Hunter's ruling and intent.

Appellant also argues that historically a preliminary injunction could be used only to preserve the status quo so that to the extent that the preliminary injunction changes the status quo, it must be overruled. Initially, it might be noted that, "Sometimes the chief value of history is the demonstration of the irrelevance of history to modern problems * * *." Francis A. Allen, Book Review, 50 Minn.

L. Rev. 997. It is significant here that the status quo changed was the operations of Baggett found by the lower court to be in clear and patent violation of Baggett's authority. The change in status quo thus enjoined Baggett's illegal operations and this was the purpose of § 322 (b) (2).

We think the language used by Mr. Justice Clark, speaking for a unanimous court in *United States* v. *Borden Co.*, 1954, 347 U. S. 514, 518-519, is applicable to the Interstate Commerce Act, particularly 49 U.S.C.A. § 322(b)(2) as it was to § 15 of the Clayton Act, 15 U.S.C.A. § 25, with which the Supreme Court there dealt:

> "* * * The private injunction action, like the treble-damage action under § 4 of the Act, supplements government enforcement of the antitrust laws; but it is the Attorney General and the United States district attorneys who are primarily charged by Congress with the duty of protecting the public interest under these laws. The Government seeks its injunctive remedies on behalf of the general public; the private plaintiff, though his remedy is made available pursuant to public policy as determined by Congress, may be expected to exercise it only when his personal interest will be served. *These private and public actions were designed to be cumulative, not mutually exclusive,* S. Rep. No. 698, 63d Cong., 2d Sess. 42; cf. *Federal Trade Comm'n* v. *Cement Institute,* 333 U. S. 683, 694-695 (1948). '. . . [T]he scheme of the statute is sharply to distinguish between Government suits, either criminal or civil, and private suits for injunctive relief or for treble damages. Different policy considerations govern each of these. *They may proceed simultaneously or in disregard of each other.' United States* v. *Bendix Home Appliances,* 10 F.R.D. 73, 77 (S.D.N.Y. 1949). In short, the Government's right and duty to seek an injunction to protect the public in-

terest exist without regard to any private suit or decree." (Emphasis supplied.)

We conclude that Judge Hunter arrived at the most equitable solution possible; that in so doing he did not abuse the discretion resting on him and accordingly, this case is affirmed.

A true copy.

Attest:

*Clerk, U. S. Court of Appeals, Eighth Circuit.*

## APPENDIX B.

In the United States District Court for the
Western District of Missouri,
Southwestern Division.

Hughes Transportation, Inc.,
Plaintiff,
vs.
Baggett Transportation Company,
Defendant.
2079.

**Memorandum and Order Granting Plaintiff's Motion for a Temporary Injunction.**

This matter is presently before the Court on plaintiff's motion for a temporary injunction pursuant to 49 U. S. C. 322 (b) (2). The Interstate Commerce Commission has asked leave to appear as of right in these proceedings pursuant to the same section and leave has been granted. At a hearing held herein on Wednesday, December 27, 1967, Mr. Harry F. Horak, Attorney for the Interstate Commerce Commission, advised the Court that no notice would be filed in this case by the Commission pursuant to 49 U. S. C. 322 (b) (3). The Commission does not ask that these proceedings be stayed. At that same hearing the Court heard testimony and received exhibits. Although the plaintiff makes reference in its motion to a decision of the Commission with regard to the portion of defendant's certificate here in question, the Court does not rest its decision in any way upon the conclusions of the Commission rendered in the matter before that body. Nor does the Court give any consideration to the contents of the exhibits received in evidence herein except as to facts contained therein and specifically incorporated as findings below.

Section 322 (b) (2) of Title 49 provides in pertinent part:

> If any person operates in clear and patent violation of any provisions of section 303 (c), 306, 309, or 311 of this title . . . . any person injured thereby may apply to the district court of the United States for any district where such person so violating operates, for the enforcement of such section. . . . The Court shall have jurisdiction to enforce obedience thereto by a writ of injunction or by other process, mandatory or otherwise restraining such person, his or its officers, agents, employees, and representatives from further violation of such section . . . and enjoining upon it or them obedience thereto.

The purpose for enacting this particular section is to "afford injured parties a measure of self-protection against operations which are openly and obviously unlawful." 1965 U. S. Code, Cong. & Admin. News, Vol. 2, at 2931.[1]

The words "clear and patent" are used in this section as a standard of jurisdiction, 1965 U. S. Code, Cong. & Admin. News, Vol. 2, at 2931.

Plaintiff, referred to herein as Hughes, contends that defendant, referred to herein as Baggett, is operating in clear and patent violation of sections 303 (c) and 306 of Title 49 (prohibiting a common carrier by motor vehicle from engaging in interstate operations unless there is in force with respect to said carrier a certificate of public convenience and necessity or permit issued by the Commission authorizing such operations) and that Hughes is injured thereby. Specifically, Hughes contends that Baggett is operating contrary to the restriction against tacking contained in its certificate. That restriction pro-

[1] There is yet no method by which the private carrier who suffers damage from such obviously unlawful operations can bring the violator into court in a suit for damages.

vides: **"No single portion of the authority contained hereinabove shall be tacked or joined, directly or indirectly, with any other authority contained hereinabove for the purpose of performing any through service"** (Emphasis ours).

From the evidence presented at the hearing the Court makes the following findings:

(1) Prior to 1960 Baggett operated as a contract carrier.

(2) In 1960 Baggett's contract carrier authority was converted to common carrier authority.

(3) The Commission placed the restriction quoted above on the converted authority of Baggett.

(4) In January of 1966 Baggett hauled "MTL Bombs Explosives" for the United States Government from Milan, Tennessee to Denver, Colorado where said explosives were interlined with another carrier and ultimately delivered at Port Chicago, California.

(5) In hauling the explosives referred to in finding number 4, Baggett asserted as its authority a route composed of tacked paragraphs 1, 19, and 10 of its certificate.

(6) Baggett has no single paragraph in its certificate authorizing it to haul explosives from Milan, Tennessee to Denver, Colorado.

(7) Baggett has hauled and continues to haul explosives for the United States Government from eastern points of origin to Denver, Colorado where it interlines with other carriers although it has no single paragraph in its certificate authorizing such hauls to Denver from the eastern points of origin. (See Appendix to plaintiff's exhibit 6 herein.)

(8) Baggett, by its Section 22 quotations and route listings holds itself out as having authority to tack portions of its authority in order to haul from eastern points of origin to Denver, Colorado for interlining with another carrier.

(9) In the past although asserting the right to haul from eastern points of origin to Denver, Colorado on the basis of tacking, Baggett has admittedly disregarded the theoretical gateways and hauled from point of origin to Denver, Colorado by a more direct route.

(10) Baggett will continue to tack and join various paragraphs of its authority and will hold itself out as having authority to so join and tack in order to haul from eastern points to Denver, Colorado unless enjoined from so tacking and joining.

(11) Plaintiff, Hughes, is certificated to haul explosives in fourteen southeastern states and the District of Columbia.

(12) Both Hughes and Baggett originate United States Government explosives traffic from numerous eastern points as disclosed in the undisputed evidence, Baggett basing its rate tender upon its tacked routes.

(13) The United States divides the explosives traffic among the various carriers who have filed rate tenders.

(14) Of those shipments of explosives for the government which Baggett originated as set forth in the Appendix to plaintiff's exhibit 6, Hughes could have originated all but two.

(15) Baggett is depriving Hughes of a portion of revenues from explosives business originating at eastern points by reason of Baggett's present rate tenders, which revenues are estimated to be from $300,000 to $500,000 per year.

The Court determines, on the basis of the evidence introduced at the hearing on the motion for temporary injunction, that Baggett has been operating and will continue to operate in clear and patent violation of sections 303 (c) and 306 of Title 49. Baggett's tacking of its various authorities in order to transport government explosives from eastern points of origin to Denver, Colorado is in direct opposition to the restriction contained in its certificate and clearly exceeds the authority granted Baggett in its certificate. The restriction placed upon Baggett is clear and unambiguous and the Court is not persuaded that the word "through" has the special meaning Baggett would attribute to it. Baggett has not called the Court's attention to any case such as this in which the word "through" was given the particular application which Baggett urges here. Opposed to the position taken by Baggett is the language of 49 U. S. C. 312 (c), that section under which contract carrier authority is converted to common carrier authority, which states: "Such certificates so issued shall authorize the transportation, as a common carrier, of the same commodities between the same points or within the same territory as authorized in the permit." Certainly Baggett had no such authority to tack as it now contends for when it was a contract carrier.

Furthermore, the Commission in T. T. Brooks Trucking Co., Inc., Conversion Application, 81 M. C. C. 561 (1959)[2] made its position clear on this matter of the restriction against tacking and nowhere in that decision gave any indication that the word "through" has the special significance Baggett urges. In that case the Commission had before it for its consideration certain recommendations of the examiner with regard to the certificates

[2] The opinion indicates that Baggett participated in these conversion proceedings and in fact converted its contract authority to common carrier authority therein.

to be issued to various contract carriers converting to common carriers. The examiner "recommended . . . (2) that such certificates should be restricted against tacking any separate grants of authority, (3) that they should not be made subject to restrictions against the interchange of freight with other common carriers. . . ." T. T. Brooks Trucking Co., Inc., supra, at 564. The Commission therein determined that the conversion was to be administered on the basis of a "substantial parity" test. It went on to state:

> When so applied, it is obvious that the certificate issued to converted carriers should authorize the transportation of the same commodities to and from the same points and . . . within the same territories for which they now hold permits, so as to insure that nothing commoditywise or territorially would be taken away from the converting carrier. By the same taken, this does not mean that the converted carrier should be granted authority, which by reason of being denominated a certificate instead of a permit, would authorize service so far beyond the scope of its previously authorized service that the test of "substantial parity" would be nullified. In other words, mere conversion should not create for a converted carrier new common-carrier operating rights which are not substantially similar, with respect to commodities and territory, to those intrinsic in its old status or which are not within the normal operating framework of its existing permits.

Discussing the restriction against tacking, the Commission observed that since the beginning of motor-carrier regulation, contract carriers have not been permitted to tack or join separate segments of authorities at common service points to perform a through service. It then stated its position on the tacking restriction at 572-573 as follows:

> Where as here a contract carrier never has held the right to tack its separate grants of authority, there is no warrant for a construction of the statute to the contrary and for one which would create new and additional operating rights beyond those formerly held by the converted carrier. Stated differently, to authorize a converted carrier to perform a through service over a combination of its present routes would be akin to authorizing the transportation, as a common carrier, of traffic between points or territories not previously authorized by that carrier's permits. Such a result would be contrary to the wording of the statute, and would likewise be contrary to what we conceive to be the basic purpose of this provision of legislation; namely, to provide in effect for an exchange of permits for certificates in such a way as to insure substantial parity between past and future operating rights. Restrictions against tacking are not uncommon in certificates issued by us in proceedings involving proof of public convenience and necessity, and there is no apparent reason why the imposition of such restrictions would be inappropriate here. We conclude, therefore, that where the possibility of tacking of separately stated operating rights exists in section 212 (c) proceedings, restrictions against such joinder should be imposed in all certificates issued.

The Commission therein permitted the converted carriers to interchange but was quick to point out at 574 that "allowing converted carriers to transport freight moving beyond their own lines will not increase the physical scope of the operations they are now authorized to perform, in the sense that allowing them to tack would." In its finding the Commission found at 578 "that the certificates issued to each of these applicants shall be subject to the condition that no single portion of the authority contained in such certificate shall be tacked or joined, directly or

indirectly, with any other authority contained in the said certificate for the purpose of performing any through service.''

The Court further finds that Hughes, a competitor of Baggett, has been and continues to be injured as a result of Baggett's conduct in excess of its authority, and is entitled to the relief prayed for.

Therefore, defendant, its agents, servants and employees, and all persons in active concert or participation with them are hereby enjoined pending final determination of this cause from tacking or joining (or holding out as authorized to so tack or join), directly or indirectly, any two or more segments of its authority under MC 76177, Sub 273, and preceding the restriction against tacking as set forth in said Sub 273 upon condition that plaintiff post security in the amount of $100,000 with the Clerk of the United States District Court to protect the interests of defendant should the temporary injunction later be proven unwarranted by the facts and circumstances.

Counsel for the parties are directed to confer with the Court in order that the case may be set down for a prompt final disposition.

It Is So Ordered.

Elmo B. Hunter.

## APPENDIX C.

### Relevant Statutes.

Section 222 (b) (2) and (3) of Part III of the Interstate Commerce Act, 49 U. S. C., § 322 (b) (2) and (3), provides:

> (2) If any person operates in clear and patent violation of any provisions of section 303 (c), 306, 309, or 311 of this title, or any rule, regulation, requirement, or order thereunder, any person injured thereby may apply to the district court of the United States for any district where such person so violating operates, for the enforcement of such section, or of such rule, regulation, requirement, or order. The court shall have jurisdiction to enforce obedience thereto by a writ of injunction or by other process, mandatory or otherwise, restraining such person, his or its officers, agents, employees, and representatives from further violation of such section or of such rule, regulation, requirement, or order; and enjoining upon it or them obedience thereto. A copy of any application for relief filed pursuant to this paragraph shall be served upon the Commission and a certificate of such service shall appear in such application. The Commission may appear as of right in any such action. The party who or which prevails in any such action may, in the discretion of the court, recover reasonable attorney's fees to be fixed by the court, in addition to any costs allowable under the Federal Rules of Civil Procedure, and the plaintiff instituting such action shall be required to give security, in such sum as the court deems proper, to protect the interests of the party or parties against whom any temporary restraining order, temporary injunctive, or other proc-

ess is issued should it later be proven unwarranted by the facts and circumstances.

(3) In any action brought under paragraph (2) of this subsection, the Commission may notify the district court of the United States in which such action is pending that it intends to consider the matter in a proceeding before the Commission. Upon the filing of such a notice the court shall stay further action pending disposition of the proceeding before the Commission.

Section 205 (g) and (h) of the Interstate Commerce Act, 49 U. S. C., § 305 (g) and (h), provides:

**Court review of Commission's orders; compelling Commission to take jurisdiction**

(g) Any final order made under this chapter shall be subject to the same right of relief in court by any party in interest as is now provided in respect to orders of the Commission made under chapter 1 of this title: *Provided,* That where the Commission, in respect of any matter arising under this chapter, shall have issued a negative order solely because of a supposed lack of power, any such party in interest may file a bill of complaint with the appropriate District Court of the United States, convened under section 2284 of Title 28, and such court, if it determines that the Commission has such power, may enforce by writ of mandatory injunction the Commission's taking of jurisdiction.

**Application of section 17 of this title**

(h) All the provisions of section 17 of this title shall apply to all proceedings under this chapter.

Section 17 (9) of the Interstate Commerce Act, 49 U. S. C., § 17 (9), provides:

**Judicial relief from decisions, etc., upon denial or other disposition of application for rehearing, etc.**

§ 17 (9) When an application for rehearing, reargument, or reconsideration of any decision, order, or requirement of a division, an individual Commissioner, or a board with respect to any matter assigned or referred to him or it shall have been made and shall have been denied, or after rehearing, reargument, or reconsideration otherwise disposed of, by the Commission or an appellate division, a suit to enforce, enjoin, suspend, or set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise.

## APPENDIX D.

### Oral Remarks of Missouri District Court at Hearing in Tri-State v. Baggett on November 8, 1967.

The Court: Gentlemen, I have taken my recess and given this matter further consideration. Everyone here is anxious that I take my position on it as soon as possible, and with that in mind, and also having in mind that my docket situation is taking me into the trial of a protracted case and that I won't have any additional opportunity to consider this or to take more time to write an order out in this case because of the necessities of that trial, I have decided to simply dictate into the record now and state in open court my rulings, and you gentlemen can get a transcript of them from the reporter.

I believe that I am just as well advised on this matter as I would be if I took considerably more time. However, I could write up a smoother order if I undertook to do that rather than to do it just by giving it to you here in open court.

First of all, I have before me Mr. Thomson's request that the stay of further proceedings order, which is pending in this action, be terminated, and for the reason that that order says on the face of it that further action in this court is stayed pending disposition of the proceeding before the Commission has been met, I agree with that situation, I do not see any further need or any reason why the stay order should not now be terminated, and I do now terminate my prior stay order as I have prescribed it.

The next matter that I have before me is the question of whether I entered a referral order of this proceeding or of a question involved in this proceeding under authority of Section 1336 (b), Title 28, United States Code.

Let me preface my ruling on that by saying that I

wish I had had that section of the statute in mind at the time I did enter my order in this case. If I had had it in mind, I feel certain that I would have referred specifically to that section of the statute and I would have made the referral under that section of the statute, because it is perfectly obvious to me that it is certainly in the interests of an orderly disposition of this type of matter that one court have the entire matter before it so as to avoid possible conflicting orders, conflicting action, conflicting considerations and problems as to who has what authority and under what circumstance, which court should go first or second, and so on. But the plain fact is that I just did not have that section in mind and I simply had before me a pleading which called to my attention that the Interstate Commerce Commission had become interested in this over all situation involving Baggett Transportation Company and the claim by Tri-State that Baggett was exceeding its Interstate Commerce Commission authority, and the suggestion in the pleading was simply that I was requested to stay further proceedings in this action, Case No. 2000, pending disposition of the administrative proceedings before the Interstate Commerce Commission.

My stay order, which is very short, simply picks up the same language, stating that the Interstate Commerce Commission, having notified this court that it intends to consider this matter in a proceeding before the Commission, and requesting a stay of further action pending disposition of this proceeding, I cited 49 U. S. C., Section 322 (b), and it is hereby ordered that further action in this court is stayed pending disposition of the proceeding before the Commission.

That simply is not a referral under Title 28, Section 1336 (b), and I can not at this time treat it as a referral.

Having regretfully crossed that bridge, I think it is clear that I, or this court, does not have jurisdiction or a right to assemble a three-judge court to review the

I. C. C. order. I take it that it is the Alabama court that does have that jurisdiction and authority. So there will be no conflict between that court in that respect.

That leaves me, then, with what I can do and what I should do under the law with any issues that are presented to me under Case No. 2000 and the statute under which plaintiff has endeavored to proceed in Case No. 2000.

Specifically, the question of whether or not I should in this case, at this time, on this record, consider issuing a temporary restraining order against Baggett Transportation Company, restraining that company from in any way violating the Interstate Commerce Commission's authorization as it has interpreted it in the proceeding before it. I also have had in mind that the I. C. C. has, as of midnight, tonight, its own stay order going into effect, unless someone, some court, restrains that order from going into effect, or prevents it from going into effect.

So I want to make my position clear, mainly as a matter of courtesy to the Alabama court, which has been very courteous toward this court in refusing, itself, to proceed until I had this opportunity to consider the matters that are pending here.

If I had the jurisdiction of this entire case on the basis that this matter had been referred to me by I. C. C. under Section 1336 of Title 28, U. S. C., I would not, upon this record, and upon my own weighing of the equities as they now appear, do anything to stop the I. C. C. restraining order from remaining in effect. The equities as I now see them, and on the record that I now have, indicate to me that it is the equitable thing that that order remain in effect until a three-judge court has reviewed the I. C. C. order and has set it aside, if they deem that they should set it aside. But pending that type of disposition, I think that the order should remain in effect.

Also, if it were not for the restraining order of the I.C.C., which will go into effect at midnight, I probably would at this time and on this record, and as I now review the law and the equities, enter a temporary injunction against Baggett Transportation Company restraining them from violating the I.C.C.'s interpretation of its authority. But I don't see any need for me to do this at this time, in view of the fact that I.C.C. has its own order which will go into effect, and I don't have any present reason to believe that the Alabama court is going to restrain that order from going into effect or prevent it from going into effect. In so saying I do not mean in any way to dictate or suggest to the Alabama court what it should do. I certainly refrain from anything of that nature. But it seems to me that the I.C.C., in its own expertise, and on the record that it has before it, is in a sound position to present and to defend its order in the Alabama court, and I think that that court eventually will be better advised and have a better working knowledge of all of the considerations that are inherent in this matter, and eventually in a better position to make the ultimate decision concerning the validity of the I.C.C. order as it has put it out; and, of course, under my own interpretation of who has the jurisdiction and venue concerning a three-judge court review it is the Alabama court that has that jurisdiction and venue.

So, I am deferring taking any action at this time, Mr. Thomson, on your request for a temoprary restraining order. I am simply keeping it under advisement. And, if future events warrant, and you wish to seek the Court's consideration of it again, you are free to file some appropriate pleading or take some appropriate action to call it up again for my consideration. But, meanwhile, out of courtesy to the court that I think will ultimately be in the best position to decide all this, and which under the law has the jurisdiction to decide it, I am going to

defer taking any action on your request for a temporary restraining order, and simply leave it under advisement.

This means, then, gentlemen, as I see it, that you are free to proceed at this time in Alabama under the request that the I. C. C. order be reviewed by that court, and the Alabama court is, of course, free to fully pursue the matter as it sees fit.

Now, I think that that pretty well indicates my general feeling about it. It is a shame that we have two courts into the picture like this, and that we have divided responsibilities and, regretfully, I didn't act in such a manner that it would all have been in this court, then I would have spared the Alabama court the same problems that I am having. But this is the posture it is in, and this is the way I feel about it on the present record.

Do you gentlemen have anything further that you wish to say or that you think I might have overlooked?

Mr. Thomson: We have nothing further, Your Honor.

Mr. Joyner: In light of Your Honor's ruling, I assume, then, that our request to file whatever this piece of paper is is no longer of any consequence and we may withdraw it?

The Court: Yes, sir. I think that is so. You certainly have my leave to withdraw it and the record will now show that you have withdrawn it. There is no use having it filed here under these circumstances, and I simply hope that all of you will cooperate toward fully presenting this matter to the Alabama court on the merits so they can finally decide the matter. The only thing that I have done is to possibly indicate my feeling about what I would do on a temporary restraining order if I had the entire case. It is certainly my feeling that the restraining order of I. C. C., if I had the matter completely in control, would remain outstanding until this case was finally settled on the merits. To that extent I possibly am not aiding Baggett in its position, but that is my feeling about it.

Mr. Joyner: Well, I am wondering, in light of something Your Honor said this morning, I am certainly not going to make such a motion, but I wonder if Your Honor would consider sending the whole packet to Alabama, under Section 1404.

The Court: I am certainly not going to do that under the status of this record. I certainly would not be helping the Alabama court. It certainly has enough in it to help adjudicate it. I will say this: I am certainly not going to do anything to embarrass the Alabama court or conflict with it. I am not going to do anything like that. It certainly has shown me great courtesy.

Mr. Joyner: And the Court has certainly shown us great courtesy.